PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

FILED OCTOBER 4, 2011

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case No. 07-O-15019
	)	
MATTANIAH EYTAN,	)	OPINION AND ORDER
	)	
A Member of the State Bar, No. 68561.	)	
	)	

BY THE COURT:[1]

Respondent, Mattaniah Eytan, represented an ex-husband in a bitterly contested post-dissolution proceeding. Eytan argued in superior court, and again on appeal, that his client had fully satisfied court-ordered payments of child support arrearages and college expenses, relying on a technical interpretation of the superior court's order. The California Court of Appeal concluded his argument was baseless and sanctioned Eytan, his associate, and his client for filing a frivolous appeal. (*In re Marriage of Gong and Kwong* (2008) 163 Cal.App.4th 510, 521 (*Gong* opinion).) The court also ordered Eytan to forward a copy of its opinion to the State Bar. The State Bar filed a Notice of Disciplinary Charges (NDC) on January 12, 2010, alleging that Eytan violated the Rules of Professional Conduct, rules 3-200(A) and 3-200(B),[2] as well as Business

[1] Before Remke, P. J., Epstein, J., and Purcell, J.

[2] Unless otherwise noted, all further references to "rule(s)" are to the Rules of Professional Conduct of the State Bar.

and Professions Code section 6068, subdivision (c),[3] by filing a frivolous appeal. The disciplinary trial commenced on September 27, 2010. After the State Bar presented its case-in-chief, the hearing judge granted Eytan's motion to dismiss, finding that the State Bar had failed to prove by clear and convincing evidence[4] that Eytan was culpable of any charged misconduct.

The State Bar appeals, asserting that the hearing judge erred in failing to give the *Gong* opinion preclusive effect as to Eytan's culpability for professional misconduct and in finding the State Bar had not satisfied its evidentiary burden. The State Bar also argues that certain statements made by the hearing judge at a pretrial conference prejudiced this case and the matter should be reversed and remanded for a new trial before a different judge.

Upon our independent review of the record (Cal. Rules of Court, rule 9.12**)**, we conclude that, notwithstanding the Court of Appeal's finding that Eytan filed a frivolous appeal, the evidence adduced in this proceeding does not clearly and convincingly establish that Eytan filed or prosecuted the appeal to harass or injure a party (rule 3-200(A)), or to assert a position that was not supported by a good faith belief in its merits (rule 3-200(B)), or to maintain an unjust action (§ 6068, subd. (c)). Moreover, we find the hearing judge did not prejudice these proceedings, and we accordingly affirm her dismissal of this matter.

I. FACTUAL BACKGROUND

Eytan was admitted to practice law in California on June 7, 1976, and has been a member of the State Bar of California since then.

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[3] Unless otherwise noted, all further references to "section(s)" are to the Business and Professions Code.

[4] The clear and convincing standard "requires a finding of high probability, based on evidence so clear as to leave no substantial [doubt] and sufficiently strong to command the unhesitating assent of every reasonable mind." (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552, internal quotations and citations omitted.)

Eytan's client, Terry Kwong, had long been enmeshed in a series of highly contentious disputes with his former wife, Monica Gong, well before Eytan substituted in as counsel of record in their post-dissolution matter. One of their disputes involved the amount Kwong owed for past-due child support and college expenses. Prior to Eytan's involvement in the case, Gong had filed a motion to enforce an order for payment of delinquent support, which had been heard by Superior Court Judge Steven Dylina on May 25, 2000, and June 5, 2000. Gong testified at the June 5th hearing that Kwong owed $208,214.06 in child support (including 10% interest) and $24,896.00 for college expenses. At the conclusion of that hearing, Judge Dylina did not make any rulings, but instead asked the parties to prepare submissions for inclusion in his Statement of Decision.

Nearly three months later, on August 29, 2000, Judge Dylina filed a Statement of Decision that he intended as "the tentative ruling of the court." It stated that "the court rules that the *current* amount due from [Kwong] to [Gong] for child support is $208,214.06" and that Kwong's obligation for college expenses "is *now* the sum of $24,896.00." (Italics added.) Four months later on March 1, 2001, Judge Dylina filed his final order. The language of the order was similar to the Statement of Decision: "The *current* amount due from [Kwong] to [Gong] for child support arrearages is $208,214.06" and "[Kwong's] obligation for one-half of the college expenses for both children . . . is *now* the sum of $24,896.00." (Italics added.) The order did not specify the effective date of the calculation of the arrearages or when payment of the arrearages was due and payable.

Kwong paid the full amounts set forth in the March 1st order. However, Gong claimed he owed additional support for the nine-month period after the June 5, 2000 hearing, reasoning that Judge Dylina had intended the child support and college expenses to continue to accrue until the final order was entered on March 1, 2001.

After Eytan substituted in as counsel of record, his associate, Eric Schenk,[5] filed a motion seeking a determination that Kwong had fully satisfied Judge Dylina's order. Eytan appeared at the hearing on the motion on March 23, 2006, before Judge Cretan. Eytan argued that Judge Dylina's order should be interpreted within its four corners and that its plain meaning was that as of March 1st, the "current amount" of outstanding child support was $208,214.06 and that the college expenses "now" owing were $24,896.00. Eytan further argued that the order had no legal effect until it was entered on March 1, 2001, and that any additional payment obligations would only accrue after that date. Finally, Eytan argued that, at most, the inclusion of the words "current" and "now" were errors in the order, which had been prepared by Gong's counsel, and the attorney had failed to timely seek a modification of the order.

Judge Cretan found that the term "current amount" in Judge Dylina's order was ambiguous because the order did not include an effective date. But he applied a "common sense interpretation" and concluded that Judge Dylina "did not mean to stop child support for a period of eight or nine months." Judge Cretan worded his ruling bearing in mind that Eytan might appeal his interpretation.

Eytan appealed to the First District Court of Appeal, where he again argued, inter alia, that a final family law order was comparable to a final judgment and should be interpreted by the plain meaning of its language and within its four corners, citing to a number of supporting authorities in his briefs. He further argued that Judge Cretan erred in finding the language ambiguous and he compounded his error when he erroneously interposed his own "common sense" interpretation.

[5] Schenk was acting under the direction of Eytan, who was responsible for all aspects of the litigation and the appeal of *In re Marriage of Gong and Kwong*.

On May 29, 2008, the Court of Appeal issued its *Gong* opinion, dismissing the matter and sanctioning Eytan, Schenk and Kwong for pursuing a frivolous appeal. Specifically, the court found that the word "current" meant as of the earlier June 5th hearing and that there was "no reasonable basis to conclude" that the child support did not continue to accrue between the hearing date and the date the order was filed. (*In re Marriage of Gong and Kwong*, *supra,* 163 Cal.App.4th at pp. 516-517.)

In finding that the appeal was frivolous, the Court of Appeal considered the objective and subjective standards for frivolousness, which were discussed in *In re Marriage of Flaherty* (1982) 31 Cal.3d 637. As explained by the Supreme Court: "The objective standard looks at the merits of the appeal from a reasonable person's perspective," i.e., whether a reasonable person would agree that the issue is totally and completely devoid of merit. (*Id*. at p. 649.) The subjective standard looks at the attorney's motives to determine if the appeal is brought in bad faith or for an improper purpose such as to delay the proceedings. (*Ibid*.) In fact, the two tests are often used together, with one providing evidence of the other and both being relevant to determine whether an appeal is frivolous. (*Ibid*.)

In the instant case, the Court of Appeal rejected Eytan's interpretation of the "plain meaning" of Judge Dylina's order because it "would have the effect of modifying the 1994 child support order by wiping out, retroactively, nine months of support and interest." The court thus concluded that "[n]o reasonable attorney would so interpret Judge Dylina's order and therefore, this appeal is meritless and objectively frivolous. [Citation.]" (*In re Marriage of Gong and Kwong, supra,* 163 Cal.App.4th at p. 518.)

However, the appellate court did not conclude that Eytan subjectively pursued the appeal in bad faith or for an improper motive. (*In re Marriage of Gong and Kwong, supra,* 163 Cal.App.4th at p. 521.) Instead, the court found an *inference* that Eytan intended to assist

Kwong in harassing Gong because Eytan's legal arguments "went beyond proper advocacy and common sense." (*Ibid*.)

II. DISCUSSION

A. The State Bar Failed to Prove Culpability by Clear and Convincing Evidence

Eytan was charged in the NDC with three acts of professional misconduct: (1) violating rule 3-200(A), which prohibits an attorney from asserting a position or defense on behalf of a client that the attorney knows or should know is without probable cause and for the purpose of harassing or maliciously injuring another; (2) violating rule 3-200(B), which prohibits an attorney from asserting a claim or defense on behalf of a client that cannot be supported by a good faith argument for an extension, modification, or reversal of existing law; and (3) violating section 6068, subdivision (c), which requires an attorney to maintain only legal or just causes or defenses. The State Bar asserts that Eytan is culpable as charged because he filed a meritless appeal for the purpose of harassing and maliciously injuring Gong.

The evidentiary centerpiece of the State Bar's disciplinary case is the Court of Appeal's finding in *In re Marriage of Gong and Kwong, supra,* 163 Cal.App.4th 510, that Eytan filed a frivolous appeal.[6] The State Bar asks us to apply the Court of Appeal's finding preclusively, so that Eytan is collaterally estopped from relitigating this finding. However, in *In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112, we were unwilling to rely on the principles of collateral estoppel to preclude an attorney who had filed a frivolous appeal from defending himself against charges of violating rule 3-200 and section 6068, subdivision (c). We

[6] The State Bar's only other evidence at trial, besides Eytan's testimony, was the documents and pleadings filed in the underlying marital and post-dissolution proceedings and appeal. While the State Bar cites extensively to these documents, they do no more than explain the factual and procedural history of the underlying litigation. These documents do not establish either an intent to harass or that the pursuit of the appeal was taken in bad faith.

acknowledged in *Lais*, as we do here, that the issues arising in civil matters may "bear a strong similarity, if not identity, with the charged disciplinary conduct." (*Id.* at p. 117.) Nevertheless, the finding by the Court of Appeal that Eytan filed a frivolous appeal is not dispositive of the disciplinary issues before us because "[t]he purposes of a disciplinary proceeding are quite different from those of a civil proceeding [citation], and the body of law is accordingly different." (*Ibid.*)

We thus independently consider the record and weigh the evidence using the clear and convincing standard of proof to determine if Eytan should be disciplined for professional misconduct. (*In the Matter of Lais*, *supra,* 4 Cal. State Bar Ct. Rptr. at p. 117.) The State Bar argues here, as it did in *Lais*, that the evidentiary standards to prove a frivolous appeal "are so high that they bring the case well within the clear-and-convincing standard . . . ." (*Ibid.*) We rejected this argument in *Lais*, holding instead that the Court of Appeal's finding of frivolousness should be treated as a "prima facie determination." (*Id.* at p. 118.) As such, Eytan had the right to introduce evidence to controvert, temper or explain the prime facie determination of frivolousness. (*In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195, 206 [respondent has right to introduce evidence to controvert, temper or explain prior civil findings].) Moreover, he was entitled to rebut the appellate court's "inference" that he intended to assist Kwong in harassing Gong by filing the appeal. And, indeed, Eytan successfully rebutted the State Bar's prima facie showing by credibly testifying about the legal bases for the appeal and his good faith belief that the appeal was meritorious.[7] Eytan's testimony thus

[7] The State Bar asserts that Eytan was not credible. However, we have given great deference to the hearing judge's credibility determination because she was in the best position to assign the proper weight to this testimony. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 315; Rules Proc. of State Bar, rule 5.155(A).)

tempered the State Bar's evidence such that it failed to satisfy its burden of proof as to each of the three counts of the misconduct charged in the NDC.

1. Count One: Rule 3-200(A)

Eytan was charged in Count One with violating rule 3-200(A), which prohibits an attorney from asserting a position on behalf of a client that the attorney knows or should know is without probable cause and for the purpose of harassment. The State Bar argues that Eytan's attempt to deprive Gong of nine months of child support was so "indefensible" on the merits as to constitute evidence that it was filed for the purpose of harassing Gong. The Bar takes Eytan to task for his "unreasonable tenacity in clinging to his interpretation of the law." But, at the disciplinary hearing, Eytan offered a credible exposition of the legal bases justifying his strict interpretation of Judge Dylina's order. Furthermore, Eytan explained that he "did not advocate a position that there was not a legitimate claim [by Gong] under the 1994 agreement. There was. But I considered that not to be before the court. Since my motion sought the limited objective of securing a satisfaction of the March 1, 2001, order and nothing else."

The State Bar attempts to counter this explanation by arguing that "[t]there is no explicit or implicit recognition in [Eytan's] Reply Brief that Gong had a valid claim for unpaid child support *prior* to March 1, 2001." (Original italics.) We do not find the absence of this argument in Eytan's briefing as clear and convincing evidence that his position was meritless or that he filed the appeal maliciously. Rather, this argument's absence is consistent with Eytan's position that his motion was solely to determine whether Kwong had satisfied the March 2001 order, and was not intended to address the parties' respective rights under the 1994 marital settlement agreement.

The State Bar further contends that the appeal was filed with malicious intent because: (1) Eytan testified in these proceedings that he believed Gong had not treated his client, Kwong,

fairly; (2) Eytan also stated he was furious whenever he lost a case; (3) the record showed his "contentious attitude with opposing counsel;" and (4) Eytan made the hyperbolic argument to Judge Cretan that generally women who receive support for adult children keep the funds for their own personal use.

The hearing judge did not find that these contentions justified the imposition of discipline, and neither do we. To do so would be contrary to the strong public policy in favor of peaceful resolution of disputes, which requires attorneys to freely advance legal arguments and remedies on behalf of clients without fear of personal liability. (See *Goodman v. Kennedy* (1976) 18 Cal.3d 335.) "The difficulty is in striking a balance that will ensure both that indefensible conduct does not occur and that attorneys are not deterred from the vigorous assertion of clients' rights. [Citation.]" (*In re Marriage of Flaherty, supra,* 31 Cal.3d at p. 648.) We thus remain cautious about establishing a disciplinary precedent that could have a serious chilling effect on the assertion of a litigant's rights.

2. Count Two: Rule 3-200(B)

Similarly, we do not find evidentiary support for a violation of rule 3-200(B), as charged in Count Two. Rule 3-200(B) requires that "as officers of the court, attorneys . . . have a duty to the judicial system to assert only legal claims or defenses that are warranted by the law or are supported by a good faith belief in their correctness. [Citation.]" (*In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 591.) The record in the instant matter establishes that Eytan had a reasonable, good faith belief that he had a bona fide appealable issue concerning the interpretation of Judge Dylina's order. Eytan's appeal was the first instance in which the issue of the interpretation of the March 1st order was presented to the Court of Appeal. (Cf. *In the Matter of Lais, supra,* 4 Cal. State Bar Ct. Rptr. at p. 112 [attorney knowingly

appealed issue to same Court of Appeal that had previously ruled against him on identical issue].)

Moreover, the Superior Court gave no indication that Eytan's position was devoid of merit or tendered in bad faith; instead, the judge observed that Eytan had presented an "interesting issue." While Judge Cretan adopted a "common sense interpretation" of the March 1st order to conclude that child support should continue during the nine-month delay before the filing of the final order, he nevertheless found "ambiguity in the language" with respect to the meaning of "current amount." Ultimately, Judge Cretan stopped just short of encouraging Eytan to appeal when he advised the parties that he intended to "set the record safely for any review [Eytan] might want to pursue." If Eytan erred in believing his appeal was warranted by the law or if he erred in his good faith belief in its correctness, his errors were reasonable.

3. Count Three: Section 6068, subdivision (c)

Our analysis of Eytan's alleged culpability under Count Three for a violation of section 6068, subdivision (c), is similar to our analyses *ante*, because the State Bar relies on the same facts to establish culpability in Counts One and Two, adding only that after the filing of the appeal, Eytan maintained an action that was neither legal or just. But this is not a case where Eytan counseled his client about how to elude a court order and to achieve this purpose unlawfully. (*Sorensen v. State Bar* (1991) 52 Cal.3d 1036.) This also is not an instance where Eytan demonstrated malicious obstinacy by repeatedly litigating the same issue time and again. (*In the Matter of Scott* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 446.) Nor has he asserted a position that was wholly disproportionate and punitive. (*In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179.)

The Supreme Court's observation in *In re Marriage of Flaherty, supra,* 31 Cal.3d at p. 650 is equally apt in this case: "Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal." In the end, we are compelled on this record to adopt the hearing judge's well-stated conclusion that Eytan "zealously and in good faith represented his client in messy, contentious and complicated post-dissolution proceedings. Even if he had been wrong on the law, his actions did not rise to the level of clear and convincing evidence of malice, harassment, frivolity or presenting an unjust or unwarranted claim." We also adopt the hearing judge's finding that the State Bar did not establish that Eytan violated section 6068, subdivision (c).

B. The State Bar's Claim of Judicial Prejudice Is Without Merit

The State Bar raises the issue of judicial prejudice for the first time on this appeal. It points to certain comments made by the hearing judge at the pretrial conference as indication that the hearing judge had prejudged this case. At the pretrial conference, the hearing judge voiced her frustration at the parties' inability to settle this case before trial, and urged them to reconsider their positions. In so doing, she compromised the appearance of her impartiality. But, rather than moving to disqualify the judge, the State Bar proceeded to trial without objection. The State Bar thus waived this issue on appeal since it did not raise it at the pretrial conference or prior to the commencement of trial. (*In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32, 42 [failure to timely raise claim of judicial bias resulted in waiver on appeal].) Moreover, while we do not condone the hearing judge's ill-considered comments, there is no evidence in the record of judicial bias at trial.

III. CONCLUSION

Eytan's position on appeal was obviously repugnant to the Court of Appeal, which reacted strongly by sanctioning him. However, when we view his actions on behalf of Kwong

through the lens of the clear and convincing standard, and we take into account his testimony in the hearing below explaining his actions, we find that his admittedly aggressive advocacy does not constitute disciplinable misconduct under rule 3-200(A), rule 3-200(B), or section 6068, subdivision (c). Based on the evidence adduced in these proceedings, we find no reasonable basis to overturn the hearing judge's decision to dismiss this case.

IV. DISPOSITION

We affirm the hearing judge's dismissal of this matter with prejudice.

In addition, because **MATTANIAH EYTAN** has been exonerated of all charges following a trial on the merits, he may file a motion seeking reimbursement from the State Bar for the reasonable expenses, other than fees for attorneys or experts, of preparing for trial, as authorized by Business & Professions Code section 6086.10, subdivision (d). (See Rules Proc. of State Bar, rule 5.131.)